



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 77 OF 2009**

**PAUL MUNENE MWANIKI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

Paul Munene Mwaniki hereinafter referred to as the Appellant was charged with the offence of rape contrary to Section 3(1) (c) of the Sexual Offences Act No. 3 of 2006 before the Kerugoya Principal Magistrate's Court. He pleaded not guilty to the charge. He was tried and convicted for the said offence and sentenced to 10 years imprisonment. Being aggrieved by the said conviction and sentence, he filed this Appeal. He has proffered 6 home made grounds of appeal which he backed up with a written submission when the matter came up for hearing. I have considered the said grounds and submissions.

The learned counsel for the state opposes the Appeal and urged the court to dismiss the same. He submitted that the charge of rape was proved by the medical evidence presented in court and also by the fact that the complainant had an injury on the thigh. This being a first appeal however, it is my duty to revisit the evidence adduced by the trial court, re-analyze it and come to my own conclusion as to whether the charge of rape was proved. As rightly submitted by the Appellant herein, there was no eye witness and the court relied solely on the evidence of the complainant to convict. She told the court that she was on her way home from visiting a friend at about 4.30 p.m. She met the Appellant who she knew well before near his home. He is said to have told her that he had been looking for her for a long time as she was boastful and didn't use to talk to people. He dragged her to his house where he threatened her with a panga. She said that she threatened to cut him with a panga but he gave her the panga and dared her to cut him. She did not do so and she appears to have given him back the panga which she said he threatened her with. From her narration, she sat in the sitting room as the Appellant tried to call his friends on the phone. He also went to the bedroom and came back to the sitting room where she was seated. On cross examination, she admitted that she was given by the Appellant his photo Album to see his photographs. On cross examination, she said that she had not talked to the Appellant before that date. She denied that she was his girlfriend before. She said that the Appellant dragged her to his bedroom and forced her to have sex with him. She did not scream. She said that after he finished, she asked him for water and he went to get the same from outside the house. She took that opportunity to leave his house but she took away his cell phone. She would not explain clearly why she took away his phone. She claimed that she took it because it was identical to her mother's phone which she was carrying. That is not nonetheless convincing because that could not be an excuse for her to take both of them. In any event, it is noted that when the Appellant caught up with her later near the church, she dropped his cell phone on the ground and started running away. She therefore clearly knew that she had taken his cell phone without his authority and that actually amounted to stealing. This explains why she was beaten up by the Appellant and others who arrived at the scene. She went home and reported to her mother that she had been raped by the Appellant. They went to the police station the following day and reported the matter. She was issued with a P3 form for treatment. According to PW4 who examined her, she had bruises on her left leg. She had a perforated hymen which was not fresh. No spermatozoa was spotted after the HVS was done and there were no bruises around her genitalia. On cross examination, PW4 stated that the complainant had told her that the bruise on her left leg was sustained after she fell down.

Clearly therefore, she has no injuries at all that could be attributed to the rape. The fact that the

perforation on the hymen was not fresh also makes it doubtful whether the complainant was raped on the date in question like she said.

The Appellant took himself to the police station later after learning that the complainant had made a report against him. He was arrested and charged with this offence.

At some point in the proceedings, the prosecutor asked for an adjournment to enable him amend the charge sheet so that he could include a charge on indecent assault. He must have realized that the charge of rape could not hold. It is not clear what happened but the amendment was not done. Surprisingly however, the learned trial magistrate convicted the Appellant on the rape charge.

In his defence which was tendered on oath, the Appellant testified that the complainant was his girlfriend. He said that she had visited him on that date and she was given the photo album to see the photographs. According to the Appellant, the complainant got angry because she saw photos of other women in the album. He escorted her later after they parted and he started walking back home, she called him back and showed him his cell phone which she had taken without him noticing. He started running after her and she also ran. It was then that the members of public at the scene intervened and ordered her to give him back his phone. She left threatening that she was not through with him yet. He denied having raped her and maintained that the complainant just wanted to fix him.

I have carefully, considered the evidence along with the submissions by the Appellant and learned counsel for the state. On the ground that corroboration was necessary before the magistrate could convict, I must say that that is not the correct position in law. Even in sexual offences, a magistrate can convict on the evidence of the complainant only. In order for this to happen however, the magistrate must caution himself/herself of the dangers involved in relying on and convicting on such evidence. Evidence of a single witness must be treated with a lost of circumspection. The trial magistrate must be satisfied that such evidence is credible and truthful before relying on the same. There must not linger any doubt as to the credibility of the same. The only question herein therefore is whether the complainant's evidence was credible enough for the magistrate to base the conviction on. On my part, I do not find it credible at all. Indeed the Appellant's evidence which was tendered on oath sounded more credible.

She could not explain how she could sit in the sitting room looking through the Appellant's photo Album and not leave. She could not explain either why she took away his cell phone without his consent. If she was not sure which one belonged to her mother, she could just have checked the screens. In any event, that was after the said "ordeal" and nothing worse could have happened to her. I did not believe her evidence at all. Although I had no benefit of seeing her testifying and thus assess her demeanor, I did not find her evidence credible in the least. It was therefore necessary in the circumstances for the learned trial magistrate to look for other corroborative evidence before convicting the Appellant.

On medical evidence, as stated earlier, the same did not in my considered view support a charge of rape. According to PW4, the bruise on the leg was sustained when the complainant was running away. She was running away when she was being beaten for stealing the Appellant's cell phone. There was also no evidence of fresh penetration into her genitalia. The act of rape was not therefore proved and that would even explain why the prosecutor wanted to amend the charge sheet.

Having considered this evidence as analyzed above, my finding is that the same fell short of the standard required to support a conviction. The conviction was in my view is unsafe and the same is unsustainable. The Appellant has good Appeal. Allow the same and quash the conviction herein and set aside the sentence of 10 years imprisonment meted out by the learned trial magistrate.

I order that the Appellant be released from prison forthwith unless he is otherwise lawfully held.

**W. KARANJA  
JUDGE**

Delivered, signed and dated at Embu this 21<sup>st</sup> day of October 2010.

**In presence of:- The Appellant & Ms. Matiru for the State.**